The Revenue relies much on the statement of principle in the speech of Lord Radcliffe in *Ostime (H.M. Inspector of Taxes)* v. *Australian Mutual Provident Society*[4]: —

"Bilateral agreements for regulating some of the problems of double taxation began, at any rate so far as the United Kingdom was concerned, in 1946. The form employed, and for obvious reasons similar forms and similar language are employed in all agreements, is derived, I believe, from a set of model clauses proposed by the fiscal commission of the League of Nations. The aim is to provide by treaty for the tax claims of two governments both legitimately interested in taxing a particular source of income either by resigning to one of the two the whole claim or else by prescribing the basis on which the tax claim is to be shared between them."

The Revenue also relied on section 132 of the 1967 Act. But, appellant contends that section 132(1) refers to the double taxation arrangements as affording relief from double taxation to specific provisions which may be included in the double taxation arrangement, itemised in sub-section (4). These arrangements are all directed at relieving income from tax or declaring which country is to tax which income. He says nowhere in the Malaysian domestic legislation or in the DTA 1966 is there any suggestion that the purpose or effect of the DTA 1966 is to tax in one country income which would not otherwise be taxable under the domestic legislation. Paragraphs 1(a) of Article IV of the DTA 1966 makes it clear that no further tax shall be imposed in Malaysia in respect of the profits of the permanent establishment which are remitted to Malaysia. If the DTA 1966 were not in existence then the profits remitted would be subject to tax in Malaysia as income. When applying DTA 1966 the provisions of section 132 of the 1967 Act become significant. Section 132 says that "as long as the order remains in force, those arrangements shall have effect in relation to tax under this Act notwithstanding anything in any written law." This means that the DTA 1966 may override the 1967 Act.

Section 40 of the 1967 Act tells what constitutes adjusted loss from a business. The DTA 1966 could vary the mode of taxation in Malaysia or Singapore. For instance, the profits which a Malaysian enterprise derives from Singapore from the operation of ships or aircraft shall be exempted from Singapore tax vide Article VI of the DTA 1966. The relief granted under DTA 1966 is in the form of an exemption by the Malaysian authority in respect of income tax payable in Singapore which would otherwise be taxed twice, that is, once in Singapore and again in Malaysia. As the DTA 1966 has varied the mode of taxation in Malaysia it is submitted that section 40 must also be read as varied by the statute. I doubt the deduction of a loss or losses incurred in Singapore can be allowed when computing tax liability in Malaysia for the simple reason that the loss or losses cannot be said to be attributable to activities in Malaysia. Consequently, the losses incurred by the Singapore branch had to be disregarded in computing the appellant company's profits in Malaysia.

Income attributable to activities in Singapore of the Singapore branch, being a permanent establishment, should be treated as a distinct and separate enterprise subject to Singapore tax law. This is the implication derived from reading paragraph 1 of Article XVII and paragraph 2 of Article IV of the DTA 1966. Whether the Singapore branch makes profits or incurs losses, in assessing tax in Singapore the chargeable income would have to be computed in accordance with the Singapore tax law. The profits after such taxation if remitted to Malaysia would not be taxed again in Malaysia. That is the measure of relief provided by the DTA 1966. There is no relief for loss. Appellants cannot try to have their losses incurred by the Singapore branch deducted from income derived in Malaysia. This would mean the losses are twice deducted, once in Singapore and again in Malaysia. As Chang Min Tat J. said appellants could not eat their cake and keep it at the same time. They cannot have two bites at the cherry.

With respect, the learned Judge is right to hold that the losses attributable to activities in Singapore of the Singapore branch could not be deducted in computing the appellant's tax liability in Malaysia for the year of assessment 1968. I would dismiss the appeal with costs here and below. Deposit to respondent against taxed costs.

Suffian L.P.: My brother Wan Suleiman F.J. who is absent wishes me to say that he concurs.

Appeal dismissed.

Solicitors: *Shearn, Delamore & Co.*

IBRAHIM BIN HAJI KARIM v. PUBLIC PROSECUTOR

[A.Cr.J. (Abdoolcader J.) March 7, 1975]
[Ipoh — Miscellaneous Criminal Application No. 4 of 1975]

Criminal Law and Procedure — Applicant charged and convicted for criminal breach of trust — Appeal against conviction on question of fact and dismissed by the court — Application to reserve certain questions for the decision of the Federal Court — Administration of Muslim Law Enactment, 1965, ss. 147, 164 and 177 — Courts of Judicature Act, 1964, s. 66(1).

The applicant was convicted on a charge of criminal breach of trust of money entrusted to him as a servant in the employment of the Majlis Ugama and Adat Melayu, Perak. His appeal against the conviction was on question of fact and was dismissed by the court. The applicant then applied to the court to reserve certain questions for the decision of the Federal Court. The application was made under section 66(1) of the Courts of Judicature Act, 1964.

Held, dismissing the application: (1) under section 66 of the Courts of Judicature Act, 1964 reference to the Federal Court must be on a question of law of public interest which has arisen in the course of the appeal and the determination of which by the judge has affected the event of the appeal. On this ground alone the application should be dismissed in limine as the questions sought to be reserved for the decision of the Federal Court did not arise and were not determined in the course of the appeal but would appear to be only an afterthought on the part of the applicant in an indirect attempt to re-appeal against and reopen the final determination of his conviction by the court;

(2) there was no substance whatsoever in the matters purportedly raised by the questions.

Case referred to:-

(1) *Tan Yin Yen* v. *Public Prosecutor* [1973] 2 M.L.J. 143.

CRIMINAL APPLICATION.

J. S. Sandu for the applicant.

Wan Abdul Majid bin Wan Hamid (Deputy Public Prosecutor) for the respondent.

Abdoolcader J. (delivering oral judgment): The applicant was convicted on June 20, 1974, in the Sessions Court at Ipoh under section 408 of the Penal Code on a charge of criminal breach of trust of the sum of $819.86 entrusted to him as a servant in the employment of the Majlis Ugama and Adat Melayu, Perak. His appeal to this court against that conviction which was wholly on question of fact apart from one ground alleging misdirection on the onus of proof was dismissed on February 3, 1975.

He now applies to this court to reserve for the decision of the Federal Court the following questions:

"1. Whether when a conviction under section 408 of the Penal Code has been upheld by the High Court, and it subsequently becomes transparent (sic) from the Appeal Record that the account actually showed a surplus and not a deficit, such conviction can be quashed on revision by the High Court or by the Federal Court.

2. Whether there was jurisdiction in the ordinary Courts to try this case in view of sections 147, 164 and 177 of the Administration of Muslim Law Enactment, 1965."

The application is of necessity made under the provisions of section 66(1) of the Courts of Judicature Act, 1964, which is the only provision of the law enabling such a reference to be made. The provisions of section 66(1) of the Act reads:

"66.(1) When an appeal from a decision of a subordinate court in a criminal matter has been determined by the High Court the Judge may on the application of any party and shall on the application of the Public Prosecutor reserve for the decision of the Federal Court any question of law of public interest which has arisen in the course of the appeal and the determination of which by the Judge has affected the event of the appeal."

It is clear from the provisions of section 66(1) that the reference to the Federal Court must be of:—

(1) a question of law of public interest

(2) which has arisen in the course of appeal and

(3) the determination of which by the judge has affected the event of the appeal.

On this score alone this application should be dismissed in limine as the questions sought to be reserved for the decision of the Federal Court did not arise and were not determined in the course of the appeal but would appear to be only an afterthought on the part of the applicant in an indirect attempt to re-appeal against and reopen the final determination of his conviction by this court.

I furthermore find no substance whatsoever in the matter purportedly raised by the first question. The applicant was represented both before the Sessions Court and this court by experienced counsel and it is extremely difficult to believe that if there was any question of a surplus as alleged this would have escaped his attention and that of the applicant. In any event, quite apart from the fact that this matter did not arise in the course of the appeal, the question raised is certainly not one of law of public interest and can at best only be said to be of personal or private interest to the applicant in the furtherance of yet another attempt to question his conviction.

The second point raised is, in my view, equally misconceived. Section 147(2) of the Perak Administration of Muslim Law Enactment, 1965, provides as follows:

"147.(2) Save as otherwise in this Enactment expressly provided no prosecution *for any offence against this Enactment* shall be had in any Court other than the Court of the Kadhi Besar or a Court of a Kadhi."

Section 164 of the Enactment provides for the wilful neglect of statutory duty by *inter alia* an Amil and section 177 makes provision for offences in connection with an Amil. It is now sought in view of these statutory provisions to question the jurisdiction of the Sessions Court which tried the case against the applicant, as the applicant in his supporting affidavit now claims to be an Amil.

It is not necessary to consider whether in view of section 177 of the Enactment a charge under the Penal Code can be preferred against an Amil as the applicant was clearly not an Amil who is defined in section 2 of the Enactment to mean "a collector of Zakat and or Fitrah appointed by the Yang di-Pertua." Section 177 of the Enactment also refers to an Amil "appointed under the rules made under this Enactment." On the applicant's own admission in evidence he was a financial clerk in the Religious Affairs Department and the evidence in the case clearly showed that he only received Zakat, Fitrah and Baitul Mal moneys from the various Kadhis who no doubt in turn received these from the several Amils who made the collection of such dues. He was not an Amil within the meaning thereof in the enactment which presupposes a person appointed for doing the actual collection of Zakat and Fitrah dues from individual Muslims. This question did not arise in the course of the appeal and it does not and cannot, in my view, arise at all and is moreover not a question of law of public interest.

It is pertinent in the context of this application to make reference to what was said by Suffian, Ag. C.J. (as he then was) when delivering an oral judgment of the Federal Court in *Tan Yin Yen* v. *Public Prosecutor:*[1]

"It is to be observed that questions of law which may be referred to us under section 66 should not be questions that are of personal interest only to the accused or the Public Prosecutor, but should be questions that are of public interest, and it seems to us better if the High Court were to exercise their discretion under section 66 sparingly, so that the references are not used as an indirect way of appealing against matters that under the law have been finally determined by the High Court."

I accordingly dismiss this application.

In the course of arguing this application Mr. Sandhu for the applicant raised the question of the revisionary powers of this court over its own decisions and submitted that the High Court can review its own decisions under its powers of revision by virtue of its inherent powers to administer justice. I do not think it is necessary for me to deal at any length with this point except to state briefly that the appeal was dismissed under the provisions of section 316 of the Criminal Procedure Code and judgment to that effect pronounced by me in open court and entered in my note-book, and I am accordingly *functus officio.* I cannot therefore exercise any such powers of review as contended even if I were inclined to, which I am not.

Application dismissed.

Solicitors: *Sandu & Co.*